No. 78-1522

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE PETITIONER IN RESPONSE TO THE MOTION OF THE UTE INDIAN TRIBE

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

CARL STRASS
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

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This memorandum is filed in response to the submission of the Ute Indian Tribe. In its motion and supporting brief, the Tribe ultimately urges that the case now be remanded to the district court for consideration of issues not previously argued or decided. We oppose that suggestion, believing that this Court properly may hear and determine the questions as to which certiorari was granted without further proceedings below.

1. The short answer to the Tribe's Motion is that the matters raised there are wholly discrete from the issues now before this Court, and that the Court's decision of the questions framed here (and already briefed by the United States) will in no way prejudice the Tribe's claims. If the United States prevails, the Tribe's objections will likely be mooted since Secretary Morton indicated that the State's "selections involve lands of grossly disparate values, within the meaning of the Department's policy" (A. 61). On the other hand, if Utah succeeds here and the judgment of the court of appeals is affirmed, there will be ample opportunity to consider the Tribe's objections before any selections are finally approved.[1] In that event, this Court might appropriately note that its decision leaves open the matters now advanced by the Tribe's Motion.

Several considerations counsel this course. First, the Court has granted certiorari and the United States has already filed its brief on the merits. After so long, the State of Utah is understandably impatient to have a definitive answer. Moreover, as the Court evidently recognized in agreeing to review

[1] Indeed, even if the Secretary enjoys no discretion in the matter, the administrative adjudication of the selections requires several determinations to be made. It must first be ascertained that the "base" lands claimed to have been lost were in fact unavailable and, if the lieu lands selected in their stead are mineral in character or are located on a known geologic structure, that the base lands were in a like category. See 43 U.S.C. 852(a)(1), (2). If those conditions are satisfied, it must yet be determined that the lieu lands are not specifically reserved, appropriated or disposed of.

the case, the issues presented are of recurring importance. Whatever the fate of the particular selections immediately involved, the dispute over the proper construction of the school indemnity selection statutes and the Taylor Grazing Act will persist with respect to other state selections in Utah, Idaho, Colorado, and four other States.[2] By contrast, the narrow issues sought to be introduced by the Ute Tribe are confined to lands within the original boundaries of the Uncompahgre Reservation. Postponing resolution of the larger questions must invite wasteful duplicative litigation.

Even so, the Court might be inclined to defer consideration of the questions presented on certiorari if it were clear that threshold objections would moot those questions in this case, or would be likely to do so. But that is not a realistic probability. Although we do not wish to characterize the Tribe's arguments as wholly frivolous, it is fair to say that the obstacles in the way are numerous and substantial. We urge the Court not to alter its normal procedures on that account.

2. The Tribe's primary point is that the lands selected by Utah in lieu of lost school sections are located within the boundaries of the Uncompahgre Indian Reservation as defined by an Executive Order of January 5, 1882 (Tribe's Motion C-1). That ap-

[2] The State of Idaho has participated *amicus curiae* in these proceedings because its indemnity selections may likewise violate the Department's gross disparity standard. We are advised that the State of Colorado has recently filed indemnity selections covering approximately 6,800 acres of oil shale lands.

pears to be correct. It is then said, again correctly, that the question whether the named Reservation remains effective, or has been terminated, is an issue in separate proceedings between the Tribe and the State now pending before the district court. In those circumstances, the Tribe submits, it would be inappropriate for this Court to render a decision expressly or impliedly premised on the disestablishment of the Reservation.

The solution, as we have already said, is for this Court to add to its decision an explicit disclaimer of any ruling on the reservation status of the lands in dispute. The Court need intimate no opinion on that question. Yet, in determining its present procedure, the Court should be advised that, in the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.

The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. Of course, we may be wrong. But the Court perhaps may accord some weight to the assessment of government officials who, although not insensitive to their special responsibility to support tribal claims, find themselves unable to do so in this instance.[3]

[3] Insofar as the Tribe suggests that the Department of Justice has an absolute duty to assert or support any claim advanced by an Indian Tribe, we reject that proposition. See *United States* v. *Mason*, 412 U.S. 391, 398-400 (1973). The United States has, in this Court, supported the claim

We simply list some of the impediments to the Tribe's claim: (1) Both in the abortive 1894 Act (Tribe's Motion G-1) and in the 1897 Act (Tribe's Motion D-1), Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to in legislation as "the former Uncompahgre Indian Reservation" (Act of March 1, 1899, ch. 324, 30 Stat. 924, 940; Act of March 3, 1903, ch. 994, 32 Stat. 982, 998, App., *infra*, 1a); (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter Reservation still subsisted (Act of March 11, 1948, ch. 108, 62 Stat. 72); (4) in the same Act (Section 2, 62 Stat. 77), Congress once again referred to the area as "the former Uncompahgre Indian Reservation" and nothing since 1948 indicates any Congressional change of mind; (5) in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the

of the Ute Tribe that the Uintah and Ouray Reservation, as originally defined, has not been disestablished or diminished. See Memorandum for the United States as Amicus Curiae in No. 76-815, *Appawora* v. *Brough*, vacated and remanded, 431 U.S. 901 (1977). And the Department has determined to take the same position in the presently pending district court proceedings. But the government does not propose to support the Tribe insofar as it asserts the continued existence of the Uncompahgre Reservation.

United States to provide the Uncompahgre Band with a permanent Reservation (*Ute Indian Tribe of the Uintah and Ouray Reservation* v. *United States*, 14 Ind. Cl. Comm. 707); and (6) at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence. Perhaps these hurdles can be overcome. But, for us, the historic evidence compels the conclusion that the Uncompahgre Reservation no longer subsists. See *De Coteau* v. *District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

3. In fact, however, it seems wholly irrelevant whether the Uncompahgre Reservation subsists or not. To be sure, the general school indemnity selection statutes, 43 U.S.C. 851-852 (Pet. Br. 2a-7a), and the relevant provision of the Utah Enabling Act, ch. 138, Section 6, 28 Stat. 109 (Tribe's Motion B-1), both forbid the selection of lands "embraced in Indian * * * Reservations." But we do not believe that prohibition applies to reservation acreage which has been unconditionally opened for entry under the general land laws, without any restriction or obligation on the part of the government to pay over or apply the proceeds of sale to the benefit of the Tribe. In those circumstances, the lands are effectively restored to the public domain and there is no reason to distinguish between entry or selection by individuals who are non-Indians and the State itself when satisfying its lieu selection rights. In such a case, the rationale of decisions like *Minnesota* v. *Hitchcock*, 185 U.S.

373 (1902), and *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920), is inapplicable and the policy underlying 43 U.S.C. 856 is controlling.[4] See *Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U.S. at 601 nn. 23 & 24.

Viewed in the light most favorable to the Tribe, that is the situation here. Indeed, as the Tribe's brief recites, except for certain mineral lands (discussed below), all the unallotted acreage within the Reservation was, by the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 (Tribe's Motion D-1),[5] "open[ed] for location and entry under all the land laws of the United States," without any conditions attached or trust imposed on the United States. Of course, this opening was later qualified by the general with-

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[4] Section 856 provides:

> Any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under law existing prior to March 2, 1895, may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement.

The statute is not strictly applicable here because the United States did not "purchase" the surplus lands, treating them, rather, as simply restored to the public domain. But the provision illustrates the congressional policy of permitting (and sometimes preferring) state indemnity selection of surplus Indian Reservation lands when no payment to the Tribe is, in any event, contemplated.

[5] As the Tribe correctly recounts, an earlier "opening up" statute was not carried out. See Act of August 15, 1894, ch. 290, Sections 20-21, 28 Stat. 337 (Tribe's Motion G-1 to G-2).

drawal order of 1934 and the inclusion of the lands within a grazing district, but the effect of these actions on state indemnity selection presumably is the same whether or not the lands are within an Indian Reservation. It is not suggested that the Tribe ever regained any property interest in the lands opened in 1897. Cf. 25 U.S.C. 463. The upshot is that a ruling endorsing the Tribe's claim that the Uncompahgre Reservation has not been disestablished will not, we believe, have any effect on Utah's selections.

4. The Tribe also asserts that, whether or not the Uncompahgre Reservation has been disestablished, the "opening-up" legislation reserving certain mineral lands from location and entry erects an independent bar to the State's selections, at least insofar as they involve tracts containing oil shale. Again, we disagree.

As the Tribe's brief notes, the 1897 statute that generally opened for location and entry the unallotted lands of the Uncompahgre Reservation excepted "all lands containing gilsonite, asphalt, elaterite, or other like substances," expressly providing that "the title to all of the said lands * * * is reserved to the United States" (Tribe's Motion D-1). If this withdrawal remained effective, the question would be whether oil shale is a "like substance." The affirmative answer suggested by the Tribe is doubtful.[6] But in any event, subsequent events moot this issue.

[6] The materials cited at page 11 of the Tribe's Motion—contrary to what is there suggested—indicate that oil shale lands were *not* excepted from entry or location in the 1897 Act. Indeed, the Interior Department Report partially quoted in the Motion treats "bituminous shale" *separately* from "gilsonite," and in the same category as "sandstone and limestone," which plainly are not reserved by the 1897 statute. Similarly, the 1958 amendment to the selection statutes, 43 U.S.C. 852(d)(1), discussed *infra*, lists "asphaltic minerals" and "oil shale" separately.

The Tribe fails to mention the Act of March 3, 1903, ch. 994, 32 Stat. 982, 998, the relevant portion of which we reproduce in an Appendix, *infra*. That statute directed the President to sell the even-numbered sections containing the specified minerals and previously reserved from location and entry "within the former Uncompahgre Indian Reservation," and, three years later, he duly issued a proclamation offering these lands for sale. Proclamation of June 6, 1906, 34 Stat. 3214 (App., *infra*, 2a-7a). While it does not appear that any sales were actually consummated, the 1903 Act may have had the effect of releasing for state selection even-numbered mineral sections.

It is true, however, that the odd-numbered sections containing the listed minerals remained "locked up." As to them, the Act of 1903 provided that they were "specifically reserved for future action of Congress." And so, the question is whether Congress subsequently released these lands—assuming, *arguendo*, that oil shale lands were included in the initial reservation. As the Tribe recognizes (Motion 12), this may have happened in 1958 when Congress amended the school indemnity selection statutes to permit selection of

mineral lands. In our view, that is indeed what occurred.

Subsection (d)(1) of Section 2276 of the Revised Statutes, added in 1958 (43 U.S.C. 852(d)(1), Pet. Br. 7a), as we read it, is designed to remove any obstacle to state school indemnity selection that results from a withdrawal of lands because they contain coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, or sulphur. Thus, the reservation of certain mineral lands accomplished by the Acts of 1897 and 1903 is cancelled. To be sure, as we argue in our principal brief, this does not immediately make these lands available for state selection because they remain subject to the general 1934 withdrawal order and are, in any event, included in a grazing district. But, henceforth, they are *potentially* available if and when so classified pursuant to the Taylor Grazing Act. The 1958 amendment would accomplish nothing if it were read to leave undisturbed withdrawals premised on the mineral character of the lands. Accordingly, we must reject the Tribe's cramped reading of that provision (Tribe's Motion 12-13).

5. In conclusion, we stress that we have discussed the Tribe's contentions for the limited purpose of indicating that they are unlikely to moot the issues before this Court. The Court need not address, much less resolve, the tribal claims here. In our submission, the Court should deny the Tribe's motion to intervene and reject the plea to remand the case. The questions agitated in that motion, we suggest,

need only be noticed by a statement in this Court's opinion expressly disclaiming any intent to prejudice their decision in the separate litigation now pending before the district court.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

CARL STRASS
Attorney

SEPTEMBER 1979

APPENDIX

1. Act of March 3, 1903, ch. 994, 32 Stat. 982, 998:

CHAP. 994.—An Act Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

* * * * *

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in

the office of the County recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the County recorder of Uintah County, Utah, within ninety days after the passage of this Act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this Act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

2. Proclamation of the President of June 6, 1906, 34 Stat. 3214:

> Whereas, by the act of Congress approved June 7, 1897 (30 Stats., 87) it was provided:

> The Secretary is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indians Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.
>
> And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances, is reserved to the United States.

And whereas, it is provided by the act of Congress approved March 3, 1903 (32 Stats., 998), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department," etc., as follows:

> That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the Act of Congress entitled 'An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations

with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the County recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such location shall relocate their respective claims and record the same in the office of the County recorder of Uintah County, Utah, within ninety days after the passage of this Act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms

and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this Act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Now, therefore, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that the even-numbered sections of surveyed lands in said former Uncompahgre Indian Reservation in Utah, heretofore reserved by said Act of June 7, 1897, to the United States as containing deposits of gilsonite, asphaltum, elaterite or other like substances, saving and excepting such of said even numbered sections as may be appropriated and claimed under discoveries and locations made and recorded prior to January first, eighteen hundred and ninety-one, and relocated and re-recorded as specified by said Act of March third, nineteen hundred and three (32 Stat., 998) and saving and excepting lands allotted to Indians, and all other lands legally reserved or appropriated, shall be offered for sale upon sealed bids at the Vernal, Utah, land office in tracts not exceeding forty acres in the aggregate, or the smallest legal subdivision approximating that area; and that the even numbered sections of said lands, now unsurveyed, after the date on which the township plat of survey thereof is officially filed in the

local land office in the usual manner, as well as any of the lands offered at this sale remaining unsold may be advertised and sealed bids invited therefor upon the same terms at the same place and at such time as may be specified in a public notice duly given by direction of the Secretary of the Interior. Inasmuch as the government is unable to determine definitely those tracts in the surveyed even numbered sections principally valuable for deposits of gilsonite, asphaltum, elaterite or other like substances bids may be offered for any forty-acre tract or lot approximating that area subject to the regulations as to proof of character of the land, to be hereafter issued.

The bids for the lands offered will be opened at the Vernal, Utah, land office on Saturday, September 15, 1906, commencing at one o'clock P.M., mountain standard time, and will continue from day to day until all bids have been examined.

All bids to receive consideration must be filed in the district land office at Vernal, Utah, before 4:30 o'clock P.M. of the day preceding that set for the opening of the bids.

The right is reserved to reject any and all bids.

As an individual, or as a member of an association, the purchaser must be twenty-one years of age and a citizen of the United States or have declared his intention to become such citizen.

Bids for said lands shall be in accordance with such form, and at such minimum price as shall be prescribed by the Secretary of the Interior who shall also prescribe all additional rules and regulations necessary to carry into full effect the sale herein provided for.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 6th day of June in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

[SEAL]

THEODORE ROOSEVELT

By the President:
ELIHU ROOT
Secretary of State.

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